veyors, *etc.* as asked for in the defendant's letter dated 22 June 1984 or with defective work. From the word "diligently", one could visualize workmen not stopping or delaying certain work, or not taking rest for a longer period than was necessary. The word "diligently" was used, be it noted, in association with the word "regular"; it should, more probably than not, mean only "industriously" or "hardworkingly". No instances of work not being continued regularly or diligently were really given in substance in the letter dated 22 June 1984, but only the request for particulars as regards sub-contractors *etc.*, and poor quality of work *etc.* amounting to defective work. Again the word default used in the same clause would *prima facie* be read together with the other words "diligently" or "regularly", *i.e.* the word default should, more probably, mean a failure to proceed with the said work diligently or regularly. It should not in the context be stretched to mean defective work; otherwise, for another reason, one may ask oneself if such defective work of such a gigantic scheme as the said work could ever be remedied within a rigid time frame of ten days as provided in clause 12(a)(ii).

In the circumstances, I repeat it would be quite a good arguable point to say first, there was no ground at all for sending the said notice of termination in the first place; secondly the said notice of termination, if there was some ground for it, was unreasonable in the circumstances; and that the defendant was, in any event, itself in breach of contract for failure to pay over to the plaintiff 98% of each of the several progress payments received at the time of the said notice of termination. The detention of such 98% of the progress payments was actually admitted but the defendant tried to justify the same.

The second condition laid down by Mustill J., duly approved by the Federal Court, was also satisfied, *i.e.* there was solid evidence that the probity of the defendant could not be relied on. The undisputed detention and use of the plaintiff's equipment, without the consent of plaintiff, and above all, the undisputed detention of 98% of progress payments No. 22 and 23, without paying the same to the plaintiff, would indicate that the probity of the defendant could not be relied on with regard to the agreed retention sum with which the Mareva injunction was concerned; in other words, the defendant would, far more probably than not, dissipate the agreed retention sum in question without paying it to the plaintiff, or dealing with it not for the purpose that was intended. The risk of dissipation was not just a mere possibility, but almost a certainty.

The third condition of Mustill J. had also been satisfied in that the court had in fact, by the sheer force of necessity, also considered the evidence of both sides.

The court, of course, did not decide final questions of liability and it would depend on evidence and submissions at the trial to determine them. Of the granting of the interlocutory Mareva injunction, the court had no hesitation on the state of evidence before it, and the Mareva injunction was therefore issued as prayed.

Order accordingly.

Solicitors: *Jeffrey Tan & Co.; Vincent Lim & Teoh.*

OFFICIAL ASSIGNEE v. NGU UNG YONG

[O.C.J. (Chong Siew Fai J.) 11 September 1987]

[Sibu – Originating Motion No. 4 of 1986]

Bankruptcy – Agreement for sale and purchase of land and transfer thereof – Vendor/transferor subsequently adjudged bankrupt – Whether agreement void as against Official Assignee – "Purchaser" – "Good faith" – Meanings of – Onus of proof – Bankruptcy Act 1967, s. 52(1).

On 25 September 1981, Kong Yuok Ung entered into a sale and purchase agreement of two parcels of land of which he was the registered proprietor. The transfer of the lands was thereafter duly made.

On 9 July 1984, Kong Yuok Ung was adjudged a bankrupt. By an amended originating motion, the Official Assignee claimed that the sale and purchase agreement was void as against the Official Assignee under section 52(1) of the Bankruptcy Act 1967. The grounds for the motion stated, *inter alia,* that the purported dealing was not genuine or *bona fide* for valuable consideration but a voluntary settlement in disguise with the intent on the part of the bankrupt to defraud his creditors and with the collusion of the respondent, Ngu Ung Yong, the other party to the agreement.

Held, dismissing the amended motion: (1) the agreement and the transfer were not in any way tainted with illegality under any of the provisions of the Land Code (Cap. 81);

(2) under section 52(1), the onus of proof of the lack of good faith and lack of valuable consideration is on the Official Assignee. The word "purchaser" is to be construed in the ordinary commercial sense and means a person who has given value. In order to constitute a purcha-

ser in good faith within the meaning of the section, it is sufficient if the purchaser acts in good faith and it is not necessary that both parties to the transaction should so act;

(3) the applicant had failed to discharge the onus of proving, on a balance of probabilities, that the settlement which he was seeking to set aside was made either without good faith or without valuable consideration on the part of the respondent as the purchaser;

(4) the totality of the evidence fell short of establishing, and was insufficient for drawing, the inference that there has been collusion on the part of the respondent.

Cases referred to:

(1) *Chin Tai* v. *Siow Shiow & Ors.* [1971] 1 M.L.J. 67 (F.C.) (folld).
(2) *Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow* [1931] 2 M.C. 126 (P.C.); [1931] A.C. 67 (refd).
(3) *Re Anson Cycle & Motor Works, ex parte the Official Assignee* [1960] M.L.J. 171 (refd).
(4) *Hance* v. *Harding* (1888) 20 Q.B.D. 732 (refd).
(5) *Mackintosh* v. *Pogose* [1895] 1 Ch. 505 (refd).
(6) *Pickup* v. *Thames Insurance Co.* (1877-78) 3 Q.B.D. 594 (C.A.) (refd).
(7) *Wakelin* v. *London and South Western Railway Co.* (1887) 12 A.C. 41 (H.L.) refd).
(8) *Rhesa Shipping Co. SA* v. *Edmunds* [1985] 2 All E.R. 712 (H.L.) (refd).
(9) *A Debtor, In re ex parte The Official Receiver* [1965] 1 W.L.R. 1498 (refd).
(10) *Baron* v. *Official Receiver* [1986] 4 A.C.L.C. 533 (refd).

ORIGINATING MOTION.

Yaacob bin Shafie for the Official Assignee.

Luk Tien Fuang for the respondent.

Cur. Adv. Vult.

Chong Siew Fai J: By an amended originating motion, the Official Assignee seeks:

(a) that the sale and purchase agreement and the unregistered memorandum of transfer both dated 25 September 1981 made between the bankrupt, Kong Yuok Ung, as vendor/transferor and the respondent, Ngu Ung Yong, as purchaser/transferee in relation to two parcels of land situate at 8th Mile, Oya Road, Sibu and described as Lot 115 and Lot 21 respectively both in Block 14 Seduan Land District be declared void as against the Official Assignee under section 52(1) of the Bankruptcy Act 1967;

(b) that the "caveat Sibu Instrument No. L. 3964/1981 be forthwith removed";

(c) damages to be assessed for the wrongful entry of the caveat aforesaid by the respondent.

The caveat Instrument No. L. 3964/1981, however, was not exhibited or produced in evidence.

The grounds upon which the amended motion is based are stated to be:

(1) that Kong Yuok Ung was adjudged bankrupt on 9 July 1984, that he was and, at all material times, had been the registered proprietor of the said two parcels of land and that pursuant to the adjudication order and by virtue of section 24(4) of the Bankruptcy Act 1967, the said two parcels of land became vested in the Official Assignee;

(2) that the said two parcels of land "were in fact vested in the Official Assignee under Instruments No. L.6122/85 and No. L.6123/85 both registered at the Sibu Land Registry Office on 3 December 1985;

(3) that "the purported dealing against the said parcels of land was not genuine or *bona fide* for valuable consideration but a voluntary settlement in disguise with the intent on the part of the bankrupt to defraud his creditors and with the collusion of the respondent";

(4) that "it is inequitable for the respondent to assert priority over the claim of the applicant in the aforesaid parcels of land".

In the course of submission by counsel for the Official Assignee at the hearing, nothing was said of grounds (1), (2) and (4). Arguments were centred upon ground (3). Nevertheless, I shall deal with those three grounds briefly at a later stage.

The amended motion is supported by the affidavit of the bankruptcy officer Latip bin Mohammad affirmed on 30 June 1986 and the affidavit of Charles Ling Lee Tiong on 5 June 1986. The respondent filed an affidavit in opposition on 2 October 1986. At the trial, Latip and the respondent were cross-examined on their affidavits and the respondent called three other witnesses.

A receiving order was made against Kong Yuok Ung on 26 September 1983, public examination was held on 28 April 1984 and 13 September 1985 and Kong Yuok Ung was adjudged bankrupt on 9 July 1984.

On 25 September 1981, Kong Yuok Ung entered into the agreement for the sale of the said

two parcels of land for $100,000 to the respondent who was his son-in-law. On the same date, a memorandum of transfer of the two parcels for $100,000 was executed by Kong Yuok Ung as the transferor and the respondent as the transferee. As one of the conditions of the lease title to each of the two parcels of land is to the effect that no transfer thereof could be effected without the consent of the Director of Lands and Surveys during the initial period of ten years from the dates of registration of the leases (which were 2 December 1974 in respect of Lot 115 and 4 December 1974 in respect of Lot 21), the memoranda of transfer were not registered with the Lands and Surveys. It is stipulated in clause 3 of the agreement, however, that until the registration of the transfer, Kong Yuok Ung shall hold the said lands in trust for the respondent or his assigns absolutely (see exh. LM 5 annexed to Latip's affidavit affirmed on 30 June 1986).

One of the contentions raised in Latip's affidavit but not argued at the hearing is that the purchase and sale agreement and transfer are illegal in view of the title condition prohibiting dealing of the lands within the initial ten years from the dates of registration of the leases. I do not think so. In *Chin Tai* v. *Siow Shiow & Ors.*[1] a restriction of somewhat similar effect indorsed on the issue document of title of land was held not to render a contract of sale illegal. At p. 69, Ong C.J. said:

"At the time when the agreement was made the Land Code (F.M.S. Cap. 138) was in force and there is authority for saying that contracts of the type made in this case suffered from no taint of illegality: see *Malaya Borneo Building Society Ltd.* v. *Ramachandran* [1959] M.L.J. 182. Nor, so far as I am able to advise myself, does any such taint attach to the transaction under any of the provisions of the National Land Code 1965. Such being the case, the agreement of 13 April 1960 must be held valid."

On the authority of *Chin Tai's* case, I am of the view that the agreement and the transfer in our instant case are not in any way tainted with illegality under any of the provisions of the Land Code (Cap. 81).

The case of the respondent is simply that the settlement of the property was made in favour of the respondent as purchaser in good faith and for valuable consideration and therefore section 52(1) of the Bankruptcy Act 1967 (hereinafter referred to as "the Act") has no application. He was prepared to accept that if the court were to hold the transaction to be otherwise than as contended by him, the settlement was void.

So far as is relevant to the instant case, the said section 52(1) provides:

"Any settlement of property, not being ... a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, ... shall, if ... be absolutely void against the Official Assignee and shall, if ... be void against the Official Assignee, unless ..."

The term "settlement" includes any conveyance or transfer of property (section 52(3) of the Act).

Under the said section 52(1), the onus of proof of the lack of good faith and the lack of valuable consideration is on the Official Assignee: *Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow*;[2] *Re Anson Cycle & Motor Works, ex parte the Official Assignee.*[3]

The word "purchaser" is to be construed in the ordinary commercial sense and means a person who has given value (*Hance* v. *Harding*[4]). In order to constitute "a purchaser in good faith" within the meaning of the section, it is sufficient if the purchaser acts in good faith, and it is not necessary that both parties to the transaction should so act (*MacKintosh* v. *Pogose*[5]).

The case of the applicant relies on what the bankrupt and the respondent, Ngu Ung Yong (D.W.1), were said to have stated in the public examination of the bankrupt. It was pointed out that in the public examination on 28 April 1984, the bankrupt had said:

"I was indebted to Ngu Ung Yong and since I was unable to pay by cash, I transferred these two parcels of land in settlement of the debt. I owed Ngu Ung Yong $100,000."

Under cross-examination in this court, the bankrupt denied having said owing Ngu $100,000 in the public examination. He said by September 1981 he was indebted to Ngu in the region of $2,000 to $3,000 being costs of repairs of his motor vehicle, Ngu, then, being a mechanic. In ordinary circumstances, it could be quite persuasively argued that a person in the situation of the bankrupt would naturally deny and that the denial hardly had any weight. However, in my opinion, such contention could not be so readily accepted in the instant case, for, in the same examination and almost immediately after the utterance quoted above, the bankrupt, upon being asked to clarify, indicated that the purchase price had been paid. He said:

"The truth is out of the $100,000 being the proceeds of the sales of lands, $50,000 were used by Hock Meng Sdn. Bhd. and $50,000 were used to send children overseas." (See exh. LM 7 annexed to Latip's affidavit made on 30 June 1986.)

Thus, even if the bankrupt had stated owing Ngu $100,000 which he in this court denied, that statement must be considered in the light of the bankrupt's evidence firstly quoted above. And, when so considered, the statement of indebtedness, in my opinion, has little force.

Another matter relied on by the applicant is the undisputed fact that as at 25 September 1981 (date of the transaction), one Hock Meng Sdn. Bhd. was indebted to the Standard Chartered Bank in the sum of $71,779.69 on its current account of which the bankrupt was a guarantor and that the bankrupt was also owing the Hock Hua Bank on on overdraft account which on 31 July 1981 stood at $18,965.62 and remained outstanding on 25 September 1981. On this point, there is no evidence, either in this trial or from the record of the public examination of the bankrupt, that Ngu Ung Yong had knowledge of the indebtedness of the bankrupt. In the public examination, he said that in 1981 he had no knowledge that his father-in-law (the bankrupt) was heavily indebted; he maintained that the transaction of the lands was a genuine purchase by him and was not in settlement of any debt.

Upon being cross-examined on this affidavit, Ngu Ung Yong said he bought the two parcels of land for $100,000 which he obtained in cash from his father and paid to the bankrupt. He said he purchased the lands because they were adjacent to a piece of land belonging to his father. While admitting that he had no other evidence showing that the purchase price was paid to the bankrupt, he said that the receipt thereof by the latter was stated in the agreement. He denied paying no money for the lands and acting in collusion with the bankrupt to defeat claims of the creditors.

D.W.2, Anthony Ting, an advocate, testified that he explained and witnessed the execution of the sale and purchase agreement and that upon his inquiry both parties expressed that the price of $100,000 had been paid though no money changed hands in his presence.

D.W.3, Ngu Chung Beng, is the father of the respondent Ngu Ung Yong. In 1981, he was already in his present mechanic business in partnership with his children and he controlled the finance. According to him, in 1981, he had savings of nearly $200,000 in his house. He said he supported his children financially when they wanted to buy land, and that when the respondent wanted to purchase the two parcels of land in question he gave him $100,000 in cash which he kept in his house. I have no reason to disbelieve him.

Having considered the evidence adduced by both the applicant and the respondent, I come to the conclusion that the applicant has failed to discharge the onus of proving on a balance of probabilities that the settlement which he is seeking to set aside was made either without good faith or without valuable consideration on the part of the respondent as the purchaser. At best, what could be said, not without reluctance, for the applicant (and I am not prepared to so hold) is that the pros and cons of the evidence of the whole case are so evenly balanced that it cannot be reasonably concluded that the settlement in favour of the respondent as purchaser was not made in good faith and for valuable consideration. The onus of proof will have to determine the issue. Cases like *Pickup* v. *Thames Insurance Co.*;[6] *Wakelin* v. *London And South Western Railway Co.*;[7] *Rhesa Shipping Co. S.A.* v. *Edmunds*[8] illustrate the principle that if, when all the evidence introduced by the parties is considered, the party, upon whom the burden of proof rests, has not discharged the burden, the decision must be against him.

For the applicant, *A Debtor, In re ex parte The Official Receiver*[9] and *Barton* v. *Official Receiver*[10] were cited in support of the proposition that section 42(1) of the Bankruptcy Act 1914 (English) (our equivalent thereto being section 52(1) of the Act) was framed to prevent properties from being put into the hands of relatives to the disadvantage of creditors. That may well be so. But each case must be considered in its own facts and circumstances, and whether a settlement of property in a case falls foul of the statutory provisions must necessarily depend upon the facts and circumstances of that particular case.

As grounds for the amended motion (grounds (3) and (4)), it was stated that the dealing was not genuine or *bona fide* for valuable consideration but a "voluntary settlement in disguise with the intent on the part of the bankrupt to defraud his creditors and with the collusion of the respondent", and that "it is inequitable for the respondent to assert priority over the claims of the applicant in the aforesaid parcels of land", I have dealt with the

issues of *bona fide* and consideration. I also find that the totality of the evidence falls short of establishing, and is insufficient for drawing, the inference that there had been collusion on the part of the respondent. The grounds must fail.

I would also briefly deal with paragraph 8(b) of Latip's affidavit made on 30 June 1986. There allegations were made about fraudulent preference and fraudulent intent. However, no evidence was led in this direction nor submissions made on fraud. This is not surprising because counsel for the applicant had, as indeed indicated in the title to the amended motion, made clear in court at the outset that the amended motion relied on section 52(1) of the Act. Owing to the stand adopted by the applicant, it is natural that the respondent took no step to rebut or encounter the alleged fraudulent preference and fraudulent intent which more appropriately falls under section 53(1) which was cited in the original motion. In any event, section 53(1) could have no application since the settlement was made on 25 September 1981 whereas the bankruptcy petition in this case was presented on 16 August 1985, *i.e.* more than the six months enacted in the said section 53(1).

In ground (1) of the amended motion, it was said that Kong Yuok Ung having been adjudged bankrupt on 9 July 1984 the two parcels of land registered in the name of the bankrupt became vested in the Official Assignee by virtue of section 24(4) of the Act. On adjudication, an Official Assignee can take no better title than that already held by the bankrupt. In the instant case, I have held that it has not been proved that the settlement in favour of the respondent as purchaser lacked good faith and for valuable consideration. That being so, the agreement dated 25 September 1981 is not void or voidable under section 52(1) of the Act. Clause 3 thereof expressly stipulated that the lands were held by the vendor Kong Yuok Ung (later, a bankrupt) in trust for the respondent as purchaser. Section 48(1)(a)(i) of the Act excludes property held by a bankrupt on trust for other persons. In the premises, the ground must also fail.

Lastly, ground (2) of the amended motion states that the two parcels of land were vested in the Official Assignee under Instrument No. L. 6122/85 and No. L. 6123/85 both registered at the Sibu Land Registry Office on 3 December 1985. The two instruments are "Applications For Transmission" made by Latip as bankruptcy officer by virtue of the adjudication order made against the bankrupt and were registered expressly subject to the caveat Instrument No. L. 3964/1981 lodged by the respondent. Since as held earlier in this judgment, the transaction complained of is not declared void and by the time of the making of the adjudication order, the bankrupt was merely holding the two parcels of land on trust, the two registered instruments purporting to be in favour of the bankruptcy officer, per se, afford no valid ground in support of the grant of the amended motion. I would add that, had relief been properly sought, I would, on the evidence and materials before me, have set them aside.

For the above reasons, the amended motion of the Official Assignee is dismissed with costs to the respondent. In the absence of an agreement, such costs are to be taxed.

Order accordingly.

Solicitors: *Robin Hii & Co.*

SOVA SDN. BHD. v. KASIH SAYANG REALTY SDN. BHD.

[O.C.J. (Lim Beng Choon J.) 9 June 1987]

[Alor Setar – Civil Suit No. 25-337-86]

Civil Procedure – Jurisdiction – Whether court has jurisdiction to determine dispute – "Local jurisdiction" – Meaning of – Place of business and place where cause of action arose different from place where proceedings instituted – Whether court is the proper forum – Whether application irregular – R.H.C. 1980, O. 81 – Courts of Judicature Act, 1964, s. 23.

On December 10, 1986, Sova Sdn. Bhd., the plaintiffs, instituted the present civil suit against Kasih Sayang Realty Sdn. Bhd., the defendants, whereby they alleged that the defendants have committed a breach of a sale and purchase agreement entered into by the two parties on March 13, 1984.

By their writ of summons with the accompanying statement of claim filed in this court on the same date, the plaintiffs sought an order for specific performance of the said agreement and alternatively a rescission of the said agreement and they also claimed damages and costs. The defendants entered an appearance to the writ on December 23, 1986 and filed their statement of defence on January 5, 1987. Prior to the filing of the statement of defence, the plaintiffs had made an application by way of summons-in-chambers on December 29, 1986, under Order 81 rule 1(b) of the Rules of High Court 1980 for certain reliefs.